APR 15 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 726

ROBERT MAXWELL WATTS, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, Robert Maxwell Watts, by his counsel, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

The District Court wrote no opinion. The first opinion of the Court of Appeals (R. 367-372) is reported at 212 F. 2d 275. The second opinion (App. 2-8) is not yet reported.

JURISDICTION

The original judgment of the Court of Appeals was entered on April 16, 1954 (R. 373). On January 10, 1955, a writ of certiorari was granted, the judgment was vacated, and the case was remanded to the United States Court of Appeals (App. 2). On March 16, 1955, the second judgment of the Court of Appeals was entered (App. 9). An order staying the mandate of the Court of Appeals was entered on March 28, 1955 (App. 9). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED[1]

1. (a) In a criminal tax evasion prosecution, where the defense is in large measure based upon honest mistake, advice of counsel, and lack of fraudulent intent, may the trial court refuse to instruct the jury to return a verdict of not guilty if they believe that items assertedly omitted from income where excluded because of a bona fide misconception of law?

(b) In such a case, may the trial court refuse to instruct the jury to return a verdict of not guilty if they find that at the time of filing the questioned return the defendant believed the return to be true or did not know it was false or did not know an additional tax was due and owing?

(c) In such a case, may the trial court instruct the jury, contrary to the instructions requested, that if the jury finds an understatement of income they can "infer, if the amount is large and substantial, that he (the defendant) knew or must have known that he was understating his income?"

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[1] In the event that this petition is granted, the petitioner will also argue that the trial court's "net worth" instruction sustained by the Court of Appeals conflicts with the principles and the requirements laid down by this Court in *Holland* v. *United States*, 348 U.S. 121. While the Opinion of the Court of Appeals on remand contains no explicit conflict with the views of this Court, the Court of Appeals has in fact failed to apply the principles established in *Holland*, and has predicated its conclusions in large measure on a factually erroneous analysis of petitioner's financial statements. (App. 5-8)

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2. (a) In a criminal tax evasion prosecution, where the defense is in large measure based upon the contention that the defendant attempted to and did in fact compensate for any omissions of income by understating his deductions so that in fact no additional tax was due, may the trial court refuse to instruct the jury that in order to convict the defendant the Government must prove that some tax in addition to what the defendant had already paid is due and owing?

(b) In such a case, may the court instruct the jury that if they find that the defendant did not report a substantial amount of income received, they are required to find as a matter of law that there is an additional amount of tax due and owing the United States?

3. (a) Where the evidence unequivocally establishes and the prosecution explicitly states that an item of property received by the defendant in an earlier year was received in consideration of services rendered and was taxable, though not reported, in the earlier year, may the trial court, in a criminal tax evasion prosecution, instruct the jury that they can find that the initial value of the property is taxable in a subsequent year in which the property is sold?

(b) Where a taxpayer erroneously deducts the cost of constructing a house, such cost in fact being a capital expenditure, is the taxpayer thereby precluded from capitalizing the cost for the purpose of computing gain in a subsequent year in which the property is sold?

(c) May the court compensate for an understatement of income or an improper deduction in an earlier year by permitting the jury to consider the item as income in a subsequent year in which the taxpayer is charged with tax evasion?

4. Where the trial court specifically calls to the jury's attention the fact of defendant's indictment, may the court

refuse to instruct the jury that the indictment is a mere accusation and is not in and of itself any evidence of guilt?

5. Where the trial court erroneously instructed the jury that the reasonable doubt which would require a verdict of acquittal in a criminal case is the "kind of doubt" which the jury "would be willing to act upon in the[ir] more important affairs," was such instruction prejudicial under the circumstances of this case?

STATUTE INVOLVED

INTERNAL REVENUE CODE:

Sec. 145 (b). *Penalties.*

> Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U. S. C. 1946 ed., Sec. 145 (b)).

STATEMENT

History of Proceedings

Petitioner, a contractor and builder in the cities of Pueblo and Craig, Colorado, was convicted of violating Section 145 (b) of the Internal Revenue Code under an indictment charging him with willfully and knowingly attempting to defeat and evade income taxes for the year 1946 by filing a false return stating his income to be $3,116.69 and his tax $404.38, whereas his income was $27,850.81 and his tax $10,704.12 (R. 6, 8, 142). The Court of Appeals affirmed the judgment of conviction on April 16, 1954. (R. 373).

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Subsequently, on June 14, 1954, a petition for certiorari was filed in this Court. The petition raised several questions asserted by the petitioner to be of substantial importance and to involve conflicts with decisions of other Courts of Appeals. The questions related to the rulings of the trial court with respect to its instructions to the jury. The overall substance of the petition was that the trial court had consistently instructed erroneously or inadequately on each important issue relating to the defense, with the result that the theories of the defense were excluded from the jury and the instructions were predicated only upon the factual hypotheses and theories most favorable to the government. (Pet. for Cert. No. 135). Only one of the principal questions (question No. 3) related directly to the "net worth" technique. In the Conclusion to the petition (Pet. p. 21) the petitioner stated that he desired to "stress that entirely apart from those questions, particularly the net worth questions, which are common to this case and to other cases in which this Court had recently granted certiorari, additional questions are here presented of such importance as to independently warrant consideration by this Court." In its Brief in Opposition the United States, after asserting that it "believe(d) the decision below (to be) correct," suggested that "this court may wish to withhold action pending decision in *Holland* v. *United States,* No. 37, in view of the similarity of two of the minor points raised, *supra,* p. 21, to issues in the Holland case" (Original Brief in Opp. p. 22).

On January 10, 1955, this Court granted the original petition for certiorari in this as well as eight other cases and remanded the cases to the respective Courts of Appeals stating *"We have not considered the merits of these cases,* nor have we determined their relation to our recent opinions, *supra,* believing that reexamination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions." (Emphasis added). (App. 2). The Court of Appeals

again affirmed the judgment of conviction on March 16, 1955. (App. 9). A substantial portion of its opinion was devoted to demonstrating that when this case was first before it, the net worth questions were not considered of importance by counsel for the Petitioner. In ruling upon the net worth questions the Court of Appeals simply paraphrased the instruction of the trial court upon which these questions were predicated and stated its conclusion that it believed the instruction to be correct. (App. 7-8).

Facts Relating to the Issues Presented

The prosecution was primarily based upon specific evidence which was introduced for the purpose of demonstrating that the petitioner had neglected to reflect several taxable transactions on his income tax return. (R. 129-132). The Court of Appeals, in its original opinion, stated that, "Some may not have been income to appellant. Without analyzing these items in detail, it is sufficient to say that they are of such a nature that many, if not all, constituted income to appellant, depending upon whether the jury believed the Government's version of the evidence or that offered by the appellant." (R. 368).

The largest single item of income asserted to have been omitted related to the receipt by petitioner of 85 shares of stock from the Moffat County State Agency, a corporation, of which petitioner was a substantial stockholder. The circumstances relating to the acquisition of this stock were as follows: The Moffat County State Agency was organized as a corporation in 1944 for the purpose of engaging in the business of building, erecting, selling and renting dwellings and apartment houses (R. 47, 53). Its operations were centered around Craig, Colorado. At the date of organization, three (3) shares of stock were issued without capital contributions (R. 53). One share was issued to Frank W. Bieser, one share to the petitioner and one qualifying share to C. L. Mann (R. 53). Bieser, for the

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years 1944 to 1946 inclusive, was president of the Moffat County State Bank (R. 53). His duties included the approval of loans made by the bank to the Moffat County State Agency on its construction projects (R. 153). Soon after the corporation was organized, the petitioner borrowed the sum of $9,000.00 from the Moffat County State Bank on his personal note and the sum of $1,000.00 from Bieser, again on his personal note. The sums thus borrowed were loaned to the newly organized corporation (R. 54, 60, 152). By the spring of 1946 the corporation had repaid to the petitioner $4,000.00 of the loan thus made, leaving a balance due him of $6,000.00 (R. 49, 154). In addition, the corporation owed to the petitioner for services rendered in connection with its construction program a sum in excess of $12,700.00 (R. 59, 154).

At this juncture, Bieser, as an officer of the Moffat County State Agency, entered into a contract to sell certain corporate properties to himself and associates at a price equal to the value of the liens which his bank then held on this property (R. 153). This produced dissension between Bieser and the petitioner (R. 153). Bieser then severed his connections with the bank, purchasing, before he left, from the bank, the petitioner's note for $9,000.00 (R. 48; Exhibit 19, R. 301). As a result the petitioner was indebted to Bieser in the sum of $10,000.00 ($9,000.00 note purchased from the bank, $1,000.00 note issued to Bieser on loans hereabove referred to). Both notes being then due, Bieser demanded payment (R. 154). After much wrangling, Bieser, the petitioner and the Moffat County State Agency entered into a three-way compromise as follows: The corporation agreed to issue to Bieser 84 shares of its stock in consideration of Bieser's transferring petitioner's notes to it (R. 51). The corporation then offset against these notes, the $6,000.00 it still owed the petitioner on his original loan to the corporation, and at the same time reduced its accounts payable to the petitioner by the sum of $4,000.00 (R. 49). The corporation

also issued 84 shares of stock to petitioner in consideration for which petitioner further reduced the corporation's indebtedness to him on its accounts payable (for construction services rendered) by the sum of $8,500.00 (R. 49-50, 154, 176). This all was accomplished in May, 1946 (R. 325).

At the time the stock was issued the corporation was heavily in debt and was in fact unable to pay the salaries previously agreed upon for its officers (R. 54-57). The entire outstanding stock of the Moffat County State Agency was issued without capital contribution. (R. 53). The corporation never paid any dividends (R. 58). The government's witness on the value of the stock issued expressly stated that he was not testifying as to its market value. (R. 60-62, 124-125, 154-156).

The petitioner testified that he did not report the value of the stock on his income tax return because it had no ascertainable market value. (R. 156). He testified that he explained the circumstances under which he acquired the stock to his attorney and accountants and that "They told me since I was on a cash basis it didn't have to be included if it didn't have an ascertainable market value, and that particular stock didn't have." (R. 186). The petitioner further testified that he relied upon this advice in not reporting the receipt of the stock as income. (R. 186).

The second largest item involved related to the sale in 1946 of a house described as the 901 Security Street property. In computing his gain petitioner used as a base the sum of $7,003.04, reflecting an initial cost base of $6,000, plus improvements in the amount of $1,003.04 (R. 371). In 1943 the Pueblo Housing Corporation owed the petitioner a considerable sum for construction services (R. 44, 184). On February 23, 1943, as part payment of its indebtedness, the corporation conveyed to the petitioner the property known as 901 Security Street, Pueblo, Colorado, "together with all hereditaments and appur-

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tenances." (R. 44; Exhibit 26, R. 302-303). This property had, at that time, a market value of $6,000.00 and upon its receipt, the petitioner reduced the amount owing to him by this corporation by $6,000.00, giving the corporation credit for $6,000.00 in payment of the house. (R. 44, 46, 151, 184). Thereafter, and from the date of its conveyance, and up to and including 1946, the petitioner made certain capital improvements thereon totaling $1,003.04 (R. 151, 271), so that on June 18, 1946, the petitioner had invested in the property a total of $7,003.04. On June 18, 1946 this property was sold by the petitioner to Dr. W. O. Brown for the full purchase price of $11,500.00 (R. 29), which sum, after the deduction of the realtor's commission ($525.00) (R. 30), was paid to and received by the petitioner. In his 1946 income tax return (Exhibit 1, R. 265, 271), the petitioner, in reporting the transaction, reduced the sale price by the cost basis of $7,003.04 (R. 271). At the trial, the Government urged that the expenses of constructing the home had been taken by the petitioner as a business expense either in 1942 or 1943, and further that he failed to report the reasonable market value of the property as income, when he received it in 1943. The evidence was conflicting and confusing as to whether or not the petitioner, who built the house, had deducted any of the construction costs as ordinary deductions in prior years (R. 99-100, 102, 103, 130, 176-177). In any event, the attorney for the government expressly stated, "We claim he received this property in 1943. It was income then and it was not reported then or in 1946 the year of sale." (R. 28). The government nonetheless took the position for the purposes of this prosecution that the entire amount of the sale price was income to the petitioner for the year 1946.

With respect to other items of income, the petitioner testified that he realized that he had omitted specific items of income at the time he filed his return; that he had no intention of filing a false return (R. 82-83, 134, 148-150).

The gist of the defense as stated by petitioner, was as follows:

> "It was the last day, and I had driven from Craig to Pueblo, and I got there at 8:00 o'clock, and I had to have it mailed at midnight; and I felt I was wrong, but I didn't have time to change everything. I thought of different items of income I might have missed, and I did think of different items of expense, but I thought it was income because it was on that side of the ledger. I did think of some. I wasn't too sure because I would have to come back and check each one to see if it was in or not. So, I calculated, more or less, and I arrived at a figure of $13,000.00 and instead of adding it onto my income, I took it off my expenses, which would make the net the same." (R. 149).

The petitioner further testified that he believed that he had more than compensated for the items of income omitted by reducing his deductions so that at the time he filed his return he believed that he had paid the government at least as much tax as was due it. (R. 134, 148-149, 182-183). A tax attorney and accountant testified that from an audit of the books, records, and cancelled checks of the petitioner, he found that while the petitioner had omitted income, he had also omitted several thousand dollars worth of deductions (R. 223). This witness further testified that his audit indicated that the petitioner had, in fact, overstated his net taxable income. (R. 206-207).

Petitioner requested and the court refused an instruction that the jury should bring in a verdict of not guilty if they believed that the items involved were omitted by petitioner because of a bona fide misconception of law. Petitioner requested and the court refused an instruction that the jury should bring in a verdict of not guilty if they found that petitioner at the time of filing his income tax return believed it to be true or did not know it to be false or did not know an additional tax was due and owing (R. 260). Petitioner requested and the court re-

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fused an instruction that willful evasion requires an intentional act or omission as compared to an accidental or inadvertent act and requires a specific intent to conceal an obligation known to exist as compared to a genuine misunderstanding of the requirements of the law (R. 259). Having refused the requested instructions, the trial court proceeded to instruct the jury that if they found a substantial understatement of income they could (R. 247): ". . . draw the inference that the defendant knew at the time he signed and filed a return that he was not reporting all of his income." Again, and further on in the same instruction, the trial court once more advised the jury that if they found an understatement of income, the could ". . . infer, if the amount is large and substantial, that he (the defendant) knew or must have known that he was understating his income."

In connection with petitioner's testimony that he had deliberately understated his deductions to compensate for omissions of income, petitioner requested the court to instruct that the Government must establish a tax due and owing in excess of that paid by petitioner, although it need not prove all of the income and tax alleged in the indictment (R. 260). The court refused and, on the contrary, instructed the jury that if they found that petitioner did not report a substantial amount of income received, they were required to find, as a matter of law, that there was an additional amount of tax due and owing the Government (R. 246).

With respect to the 901 Security Street property, petitioner requested the court to instruct that if the petitioner received the property in 1943, its receipt was not income in 1946 and must not be considered by the jury for that purpose (R. 263). The court refused, and instructed the jury that if they found that petitioner claimed the cost of building the house as a deduction in an earlier year, "as a matter of law he had no cost in the house, or any other basis, and . . . the entire value of the house was profit under the income tax law . . ." (R. 249).

The Government also attempted to prove an understatement of income on a "net worth" theory. The net worth proof offered by the Government consisted solely of financial statements for the years 1943-1946 filed with a private lending institution (R. 15-16, 19). The statements were admitted over the objection of counsel (R. 16, 138, 163, 168). The Government witness testified that he had checked none of the items set forth as assets and liabilities in the statements and he had no knowledge of their correctness (R. 19). Petitioner's uncontradicted testimony was that there was no correlation between his taxable income and asserted increases shown by the financial statements; that the items on the financial statements did not reflect the cost of the items to him, but rather reflected his view of the current market value; and that therefore they were replete with appreciations in value which had not been realized for income tax purposes (R. 168-171). The petitioner specifically testified that the items on the financial statements represented, "what I considered it would probably bring on the market if placed on the market." (R. 101, 164). No evidence was introduced by the Government to establish, apart from the financial statements, the petitioner's opening net worth, or to prove that the asserted increases in net worth shown by the financial statements were in fact not attributable to unrealized appreciation in value, or to other non-taxable sources.

With respect to the net worth proof offered by the Government, the court instructed the jury, over an objection, as follows (R. 247):

> ". . . the government claims that if he, during that time, made purchases, spent money, and that sum of money which he spent is substantially in excess of what he reported on his income tax return, and that that money is not shown to have been inherited or received by him by way of a gift, it is reasonable to infer that he derived the money from earnings, from income, and if that sum of money is substantially in a sum larger than the amount he had been report-

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ing on his income tax return you, ladies and gentlemen of the jury, are entitled to take that into account.

"You may infer that the money was income that he didn't report, and you may infer, if the amount is large and substantial, that he knew or must have known that he was understanding his income."

The trial court further, while specifically calling the jury's attention to the fact of the indictment, refused to instruct the jury that the indictment was a mere accusation and was no evidence of guilt in and of itself (R. 257). It refused to grant petitioner's request for a standard instruction on burden of proof and instructed the jury in this respect in a manner objected to by petitioner and held to be erroneous in *Holland* v. *United States* (infra, p. 24). (R. 258, 250).

REASONS FOR GRANTING THE WRIT

The two decisions of the Court of Appeals sustaining the conviction of the petitioner under section 145 (b) of the Internal Revenue Code involve several questions of substantial importance in the prosecution of tax evasion cases and in the administration of the criminal laws generally. The decisions involve conflicts or inconsistencies in principle with numerous decisions of other Courts of Appeals as well as decisions of this Court.

While the issues as individually phrased and presented merit this Court's consideration, an even more basic problem is presented by the trial court's consistent refusal to give the jury any instructions relating to the legal theories of the defense or upon any factual hypotheses supporting the defense. An analysis of the trial court's rulings with respect to its charge to the jury, when considered in relation to the record and to the requests for instructions, reveals that only the government's case and theories were explained to the jury by the trial court. Only those factual hypotheses which were favorable to the prosecution

were mentioned in the trial court's instructions. The word "inference" was used only to inform the jury of those inferences which might be drawn against the petitioner. The law relating to the basic defenses of the petitioner was either excluded or inadequately discussed in the trial court's instructions although this prejudicial result could have been avoided by the granting of requested instructions, the legal validity of which was beyond doubt.

1. The decisions below, in so far as they sustained the trial court's rulings on instructions relating to the elements of misconception of law, guilty knowledge, and wrongful intent are squarely in conflict, or totally inconsistent in principle with decisions of the United States Courts of Appeals for the Third, Fourth, Fifth, Sixth and Tenth Circuits. *United States* v. *Martell,* 199 F. 2d 670 (CA 3); *Stinnett* v. *United States,* 173 F. 2d 129 (CA 4); *Jones* v. *United States,* 164 F. 2d 398 (CA 5); *Hargrove* v. *United States,* 67 F. 2d 820 (CA 5); *Lurding* v. *United States,* 179 F. 2d 419 (CA 6); *Haigler* v. *United States,* 172 F. 2d 986 (CA 10). The decisions below are further inconsistent in principle with the decisions of this Court in *Spies* v. *United States,* 317 U. S. 492, and *Holland* v. *United States,* 348 U. S. 121.

The largest single item of income asserted by the Government in this case to have been improperly omitted related to the receipt by the petitioner of 85 shares of stock of a closely held corporation which the Government contended constituted taxable income in the amount of $8,500.00 upon receipt. The entire theory of the defense with respect to the stock, as expressed by the petitioner, was that he did not report the value of the stock as income because he did not believe the stock had any ascertainable value; that he did not believe that the transaction was taxable; and that he further consulted both his accountants and an attorney to whom he made full disclosure and who advised him that the stock was not reportable as income if it did not have an ascertainable market value and that it

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did not, in fact, have an ascertainable value (R. 155-156, 185-186). Furthermore, the evidence relating to the Security Street property transaction, the second largest item involved, discussed in greater detail *infra* p. 21, even when viewed from the standpoint most favorable to the government, establishes that a serious legal question existed as to the taxability in 1946 of the entire proceeds of the sale.

With respect to the remaining items assertedly omitted from income the petitioner freely admitted that he realized when he filed the return that he had omitted specific items of income. The theory of the defense was, however, that the petitioner had no intention of filing a false return; that because of the short period remaining between the time his return was prepared and the time it was due he attempted to and did in fact compensate for any omissions of income by substantially understating his deductions; and that he believed that on the basis of the return filed he had paid the Government at least as much tax as was due it (R. 134, 148-149). Substantial support for the petitioner's testimony was given in the testimony of an accountant who testified that an audit of the books, records and cancelled checks of the petitioner indicated that he had overstated his net taxable income (R. 206).

Notwithstanding this state of the record and notwithstanding the fact that the defense was critically hinged to the issue of the petitioner's good faith and lack of wrongful intent, the trial court refused to instruct the jury to return a verdict of not guilty if they believed that items were omitted by the petitioner because of a bona fide misconception of the law (R. 260).[2] The trial judge further refused to instruct the jury to return a verdict of not guilty if they found that at the time of the questioned return the

[2] Nor can the failure to so instruct be justified as the Court of Appeals suggested (R. 370-371) because the particular defense did not relate to every item. The defense did relate to the most important items and the substance of the instruction should have been given to the jury.

petitioner believed the return to be true or did not know it was false or did not know an additional tax was due and owing (R. 260). And, consistently, the trial court also refused to instruct that a willful evasion of the tax requires an intentional act or omission as distinguished from an accidental, inadvertent or innocent one and requires a specific wrongful intent to conceal an obligation known to exist as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable (R. 259). Having refused the requested instructions, the trial court proceeded to instruct the jury that if they found a substantial understatement of income they could (R. 247): ". . . draw the inference that the defendant knew at the time he signed and filed his return that he was not reporting all of his income." Again, and further on in the same instruction, the trial court once more advised the jury that if they found an understatement of income, they could "infer, if the amount is large and substantial, that he (the defendant) knew or must have known that he was understating his income."[3]

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[3] To be contrasted with the instruction here is the instruction approved by the Court of Appeals for the Fourth Circuit in *Stinnett* v. *United States* (173 F. 2d 129). In the *Stinnett* case, the taxpayer had complained of an instruction to the effect that the jury should find him guilty if it believed that "the defendant received income during these respective years in an amount or amounts greater than the amount which he stated in his return . . ." The Court of Appeals, however, sustained the conviction below for the reason that the ambiguity was immediately cleared up in the succeeding sentences in the same paragraph, which were set forth with approval: (p. 130)

> "It is not necessary that the Government prove the precise amount. You may believe that it was less than the amount the Government claims but if you believe that he received an amount greater than the amount which he returned and you further believe that in making out his returns he knew that he was reporting less than the true amount of his income, that he made out the return knowing that and with the purpose of defrauding the Government by making that return, then you shall find him guilty. Unintentional or inadvertent mistakes on the part of the defendant are not sufficient to convict.

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Nor were these deficiencies overcome, as the government suggested (Original Brief in Opp. p. 12) by the trial court's general instruction on the issue of willfulness (R. 245-246). The instruction did no more than state that willfulness was an essential element of the crime, informing the jury that it could find willfulness if it was "satisfied by the evidence that he knew what he was about . . ." Apart from the inadequacy of such instruction in the light of the specific defenses and issues, this instruction must be read in the light of the subsequent instruction in which the court improperly informed the jury that it could infer from a substantial understatement of income that "the defendant knew at the time he signed and filed his return that he was not reporting all of his income" (R. 247).

The position of the trial court as sustained by the Court of Appeals is contrary to the principles enunciated by this Court in the *Spies* and *Holland* cases, supra, and by the Courts of Appeals in the numerous cases cited above. The instructions of the trial court are diametrically opposed to the rule set forth by this Court in *Holland* v. *United States, supra*:

> "A final element necessary for conviction is willfulness. The petitioners contend that 'willfulness involves a *specific intent which* must be proven by independent evidence and which *cannot be inferred from the mere understatement of income.*' This is a fair statement of the rule." (emphasis added)[4]

You must believe that he knew that he intentionally and deliberately filed a return for an amount less than he actually received, and if you believe that with respect to any one of those returns for the years 1942, '43, and '44, you should find him guilty for such year or years as you believe that he deliberately and intentionally misstated his income."

[4] The Government argued in its original Brief in Opposition (p. 14) that the trial court referred to other indicia of willfulness (all incidentally on factual hypotheses unfavorable to petitioner). It is clear from reading the instructions, however, that the jury was informed that it could infer guilty knowledge from the mere substantial understatement of income without reference to other facts.

The invalidity of the trial court's instruction is pointed up by the following statement of the Court of Appeals for the Sixth Circuit in *Lurding* v. *United States, supra,* page 422:

> ". . . The Court advised the jury that the best evidence of what a person intended to do by an act is the act itself. Undoubtedly this generalization in many contextual environments is sound. Standing alone, however, it may give rise to misunderstanding in the minds of lay jurors. The act here involved is the filing of an inaccurate return. In the complexity of successive tax laws, many thousands of taxpayers do that innocently. Such filing is unlawful, however, only if made wilfully, with knowledge of its falseness and with intent to evade taxes. *There is no presumption that may be drawn from the act itself--both knowledge and wilfulness must be established by independent proof, direct or circumstantial*" (emphasis added).

To the same effect are *Hargrove* v. *United States, United States* v. *Martell,* and *Wardlaw* v. *United States,* supra, all involving reversals of convictions under Section 145 (b) because of erroneous instructions or refusals to instruct on the requirement of intent. Both the *Hargrove* and *Martell* cases reiterate the principle that "a specific wrongful intent to conceal an obligation known to exist" is a prerequisite to conviction;[5] and this intent, as emphasized by the Court of Appeals in the *Wardlaw* case, *supra,* page 885, "is not inherent in the act itself, but . . . must be proved by or clearly inferred from the evidence". In the present case the trial court's position, sustained by the Court of Appeals, with respect to the instructions requested and the instruction actually given on the issue of intent was not only erroneous as a matter of law but served to exclude from the jury's consideration defenses of primary importance.

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[5] *United States* v. *Martell, supra,* page 672.

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2. The decisions below, insofar as they effectively eliminated the requirement of proof of an additional tax due and owing to sustain a conviction under Section 145 (b), are in conflict or inconsistent in principle with decisions of the United States Court of Appeals for the Second, Seventh, and Eighth Circuits in *United States* v. *Schmeck*, 126 F. 2d 702 (CA 2); *Tinkoff* v. *United States*, 86 F. 2d 868 (CA 7); *United States* v. *Rosenblum*, 176 F. 2d 321 (CA 7); and *Gleckman* v. *United States*, 80 F. 2d 394 (CA 8). As previously indicated, the defense was in very large measure based upon the contention, supported by testimony of both the petitioner and his accountant, that while the petitioner did receive items of income not reflected in his return, he attempted to and did in fact understate his deductions to compensate for omitted items of income so that there was in fact no tax due in excess of that paid in accordance with the questioned return. In this state of the record the petitioner requested the court to instruct the jury that in order to convict, the Government must establish "that a tax, in addition to what the defendant has already paid is due and owing . . . although the Government need not prove all of the income and tax alleged in the indictment." (R. 260). The trial court refused to grant the requested charge to which the petitioner was clearly entitled under the decisions recited above. Contrary to the requested instruction the trial court instructed the jury that "the tax follows as a matter of law from a determination of whatever income was earned which should have been reported" (R. 246). The court further instructed the jury as follows (R. 246):

> ". . . if you find that the defendant had substantial taxable income in the year 1946 which he did not report on his income tax returns, then you will find that there was a substantial amount of tax due to the United States Government for that year . . ."

By the giving of such instructions the trial court under the circumstances of this case in effect directed the jury

to ignore a critical defense of the petitioner. That the petitioner had omitted income was expressly admitted by the petitioner, whose defense, however, was based on the contention that these omissions had been more than compensated for by the understatement of deductions. Had the court given the instruction requested by petitioner, the defense would have been fairly posed to the jury and the instruction would have been in harmony with the law as clearly established by the decisions of the Court of Appeals above.[6] The effect of the rulings of the trial court as sustained by the Court of Appeals was to mislead the jury as to the requirement of proof of an additional tax due and owing to sustain a conviction. The effect of the court's instructions here when considered in relation to the instructions discussed elsewhere was to exclude the entire theory of the defense from the jury's consideration.

3. The decisions below, insofar as they allowed the jury to compensate for an understatement of income or an improper deduction in an earlier year by considering the item as income in a subsequent year in which the taxpayer was charged with tax evasion, are in derogation of the annual accounting concept of the Internal Revenue Code and are in conflict or inconsistent in principle with decisions of the United States Courts of Appeals for the First, Third, Fourth and Eighth Circuits. *Ross* v. *Commissioner of Internal Revenue,* 169 F. 2d 483 (CA 1); *Commissioner of Internal Revenue* v. *Mellon,* 184 F. 2d 157 (CA 3); *Clifton Mfg. Co.* v. *Commissioner of Internal Revenue,* 137 F.

[6] The government's attempt to justify these erroneous rulings on the theory that the defense was not a "complete" defense (Original Brief in Opposition p. 15) has no merit. It is true that with respect to the Moffat State Agency stock transaction and the Security Street Property transaction, the petitioner had specific defenses which the trial court also neglected fairly to pose for the jury's consideration. This can certainly not justify the erroneous rulings of the trial court with respect to the particular defense involved here.

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2d 290 (CA 4); *Greenwood Packing Plant* v. *Commissioner of Internal Revenue,* 131 F. 2d 787 (CA 4); *Welp* v. *United States,* 201 F. 2d 128 (CA 8). The unequivocal evidence established that in 1943 the petitioner received from the Pueblo Housing Corporation a piece of property described as 901 Security Street in consideration for services rendered (R. 27-28, 30, 44, 46). The deed recited that the property conveyed consisted of the described real estate "together with all . . . hereditaments and appurtances . . ." (R. 302). The evidence also unequivocally established that the corporation tranferring the house was credited in 1943 with $6,000 which was previously owed by it to the petitioner (R. 44, 46, 184). Tho house was thus taxable income in 1943, the year of its receipt by the petitioner, and this was precisely the theory of the prosecution. Thus, the attorney for the Government made the following statement: "We claim he received this property in 1943. It was income then and it was not reported then or in 1946, the year of sale." (R. 28). In this factual context the petitioner requested the court to instruct the jury (R. 263):

> ". . . that if the Pueblo Housing Corporation conveyed the property located at 901 Security Street in the City of Pueblo to the defendant during the year 1943, the receipt of the property was not income during the year 1946, was not reportable as such and must not be considered by you for that purpose."

The instruction was refused (R. 263). That the petitioner, under the annual accounting concept of the federal revenue laws, was entitled to such an instruction is clearly established by the decisions of the Courts of Appeals in the above-cited cases. As the Court of Appeals for the First Circuit in *Ross* v. *Commissioner of Internal Revenue, supra,* stated, page 492:

> ". . . a taxpayer has an affirmative obligation to report any income falling within its scope in his return for the year of such receipt, and that his failure

> to do so will subject him to such liabilities for interest, penalties, or even criminal prosecutions, as may be appropriate to his case. If this is so, the doctrine does not merely afford a special choice which the Commissioner may, if he sees fit, exercise retroactively against a taxpayer, but a rule of law determining what constitutes taxable income, and as such presumable binding on all parties." [7]

Contrary to and in disregard of the settled rule, the trial court erroneously instructed the jury that if they found that the petitioner claimed the cost of building the house as a deduction in a prior year "as a matter of law he had no cost in the house, or any other basis, and . . . the entire value of the house was profit under the income tax law . . ." (R. 249).[8] The Court of Appeals without citation of authority adopted this view, which was in fact wholly wrong under the very same principle of law expressed in the previously cited cases. Construction costs are capital expenditures and not ordinary deductions; and the Government could

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[7] The court after rejecting a defense of estoppel by pointing out that "A mere failure to report income is not a representation that such income has in fact not been received", went on to observe, page 496:

> "In sum, we hold that the Tax Court, erred in attributing to 1939 the disputed items of accrued salary, that if these items were constructively received when earned they cannot be treated as income in any later year, that the doctrine of election is inapplicable to the facts of this case, and, in the absence of misstatement of fact, intentional or otherwise, the petitioner cannot be estopped from asserting that the items were taxable only in the years in which constructively received."

To be noted also are the provisions of Section 3801 of the Internal Revenue Code of 1939 which would permit a readjustment of the petitioner's liability for the earlier year in which there was an erroneous exclusion from income or erroneous deduction.

[8] The evidence was actually conflicting and confusing as to whether or not the petitioner had in fact deducted any of the construction costs as ordinary deductions in prior years. (R. 99-100, 102-103, 130, 176, 177).

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no more compensate for an erroneous deduction in a prior year than it could for an understatement of income. Being capital expenditures, the construction costs formed part of the petitioner's base whether or not he erroneously deducted any such costs in a prior year.[9] The law on this precise point is well summed up in Mertens' *Law of Federal Income Taxation*, Vol. 4, Section 23. 26, page 31, where the author states:

> "CAPITALIZATION OF ASSETS PREVIOUSLY CHARGED OFF AS EXPENSE. If, by reason of inadvertance or irregular accounting practices, capital investments have been charged off as expense items, they may be restored and depreciation allowed on such capital investment. It has been said:
>
> "The mere failure of a taxpayer to take the proper deduction in each year does not permit him to take advantage of his mistake through an incorrect return in a later year nor does it permit the Commissioner to compel an incorrect return. The law does not contemplate the adjustment in any part of an incorrectly computed tax by the incorrect computation of another tax . . ."

Nor is there any merit in the position of the government which seeks to justify the refusal of the requested instruction on the ground that such instruction was only partly correct since the property conveyed in 1943 consisted only of the real estate valued at $1000 and not the house which the government asserts was always owned by the petitioner (Original Brief in Opposition p. 18-19). Apart from the fact that the evidence was overwhelming to the effect that both the house and lot valued at $6000 were transferred in 1943 (R. 27-28, 43, 46, 151, 184), there appears to be no reason why here as elsewhere the trial court should have instructed the jury only upon the factual hypothesis favorable to the government.

---

[9] Petitioner is aware of no authority to support the proposition that construction costs are not capital expenditures in the case of a contractor (See Original Brief in Opposition, p. 20).

4. The decision of the Court of Appeals in sustaining the trial court's refusal to instruct the jury that the indictment was a mere accusation and was not evidence of guilt is squarely in conflict with decisions of the United States Courts of Appeals for the Third, Fifth, and Eighth Circuits, which hold that such instruction when requested must be given. *United States* v. *Schanerman*, 150 F. 2d 941 (CA 3); *Gold* v. *United States*, 102 F. 2d 350 (CA 3); *Patterson* v. *United States*, 183 F. 2d 687 (CA 5), cert. denied 343 U. S. 951; *Cooper* v. *United States*, 9 F. 2d 216 (CA 8); *Nanfito* v. *United States*, 20 F. 2d 376 (CA 8). Nor is there any merit whatsoever in the suggestion of the Court of Appeals that the need for such an instruction can be obviated by an instruction on burden of proof or presumption of innocence. An instruction relating to the requirement that the Government adduce evidence which convinces the jury beyond a reasonable doubt or to the presumption that a man is innocent until such evidence is produced has no bearing on the question as to whether or not an indictment may be considered as evidence by the jury. Under no circumstances, in this case, could the refusal to grant the requested instruction be mitigated by the instruction on proof beyond a reasonable doubt, since the particular instruction on reasonable doubt given by the trial court here has been held in *Holland* v. *United States, supra,* to be confusing and erroneous, although in that case not prejudicially so. Nor can any support be found for the Court of Appeal's position in the decisions of the other Courts of Appeals cited above. Particularly where, as here, the trial court in its instruction calls to the jury's attention the fact that a defendant has been indicted and had been charged with a criminal offense, it is all the more important that the trial court instruct the jury that the indictment has no evidential significance.

5. The instruction to the jury that reasonable doubt is the "kind of doubt" the jury "would be willing to act upon in their more important affairs," has been held by

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this Court in *Holland* v. *United States, supra,* to be erroneous and of a character which "would seem to create confusion." While the error was held not to be prejudicial in the *Holland* case the matter is now presented to this Court on the ground that when considered together with the other issues raised by the trial court's charge the instruction seriously prejudiced this petitioner.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted and the case remanded to the United States District Court for a new trial.

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APPENDIX

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IN THE

Supreme Court of the United States

October Term 1954

No.

ROBERT MAXWELL WATTS, *Petitioner*

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

APPENDIX TO PETITION FOR CERTIORARI

Order of the Supreme Court, Watts v. United States, No. 135

(Filed January 10, 1955)

Per Curiam: The petitions for certiorari and for rehearing are respectively granted. The judgments are vacated and the cases are remanded to their respective Courts of of Appeals "for consideration in the light of *Holland* v. *United States, Friedberg* v. *United States, Smith* v. *United States,* and *United States* v. *Calderon,* decided by this Court December 6, 1954."

We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, supra, believing that reexamination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions.

Mr. Justice Black dissents.

Judgment of the Supreme Court

(Filed January 10, 1955)

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Tenth Circuit, and was duly submitted.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Tenth Circuit for consideration in the light of Holland v. United States, Friedberg v. United States, Smith v. United States, and United States v. Calderon, decided by this Court December 6, 1954.

January 10, 1955.

Mr. Justice Black dissents.

Opinion, United States Court of Appeals for the Tenth Circuit

WATTS v. UNITED STATES, No. 4736

(March 16, 1955)

Hal D. Reed (Frank A. Bruno and Anthony F. Zarlengo were with him on the brief) for Appellant;

Robert D. Inman, Assistant United States Attorney, (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

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Before PHILLIPS, Chief Judge, HUXMAN and MURRAH, United States Circuit Judges.

HUXMAN, Circuit Judge.

The United States Supreme Court vacated the judgment of this court[1] and remanded the case by mandate which in part states, "for consideration in the light of Holland v. United States, Friedberg v. United States, Smith v. United States, and United States v. Calderon, decided by this court December 6, 1954. We have not considered the merits of these cases, nor have we determined their relationship to our recent opinions, supra, believing that reexamination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions."

In compliance with the mandate of the Supreme Court, we have given the case further consideration. A reexamination of the record reveals that in the trial of the case the Government relied in part upon net worth but in a large measure upon specific transactions to establish additional unreported income for the calendar year 1946. There were numerous specific transactions during 1946 from which the Government contended taxable income resulted which were not reported. Among these transactions were the following: 1. The Biggins Transaction. Biggins was indebted to the Moffat County State Agency[2] for the purchase of a home. After a dispute as to the exact amount, Biggins gave two checks totalling $1,500 to the Moffat County State Agency, which were endorsed by appellant and deposited to his personal account; 2. Appellant received payment for construction services from Kerlyn Oil Company the

[1] Opinion reported in 212 F. (2d) 275.

[2] Appellant's corporation.

sum of $1,567.01; 3. Stanton and Associates paid him $237.00; 4. Roope paid an indebtedness to the Moffat County State Agency in the sum of $1,183.35, which appellant deposited to his personal account; 5. Appellant received payment for work and labor done from Pueblo Housing Corporation the sum of $3,500; 6. Morgan and Terrill, a partnership, was indebted to appellant for construction work, and appellant had them pay one Paul Duncan the sum of $1,433.07 for an automobile, for himself, for which appellant then credited the partnership[3] on their account for $1,500; 7. Appellant received 85 shares of stock from the Moffat County Agency of the par value of $8,500 for construction services rendered; and 8. Appellant sold a house, located at 901 Security Street, Pueblo, Colorado, in 1946 for $11,500, which because of the nature of the transaction at the time the house was built by appellant the Government contends the entire $11,500 was taxable income.

It was the Government's contention that all of these items as well as others constituted taxable income for the year in question. Whether these items constituted taxable income to appellant was a disputed issue of fact depending upon whether the jury believed the Government's version of these transactions or that tendered by appellant.

In addition to the above the Government introduced five financial statements prepared and signed by appellant and submitted by him to a bank to establish a line of credit. Objection was made at the time of trial by appellant to some of the evidence relating to net worth as well as to the court's instructions pertaining to net worth. However, when appellant appealed to this court, he completely abandoned his objections to the evidence with respect to that phase of the case or the instructions of the court relating thereto. No assignment of error in appellant's brief is predicated thereon and no argument was made in this

[3] In addition to operating through the Moffat County State Agency, he also carried on operations through a partnership.

court with respect to that phase of the case. In fact, appellant's brief before this court does not contain the words "net worth". Accordingly, when the case came before us we decided it on the issues presented to us. These issues are reflected in our opinion and need not be restated herein.

The general rule is that errors relied on for reversal in order to be entitled to consideration must be specifically pointed out in accordance with applicable rules of practice. It is not the duty of an appellate court to search the record for error not urged by the parties.[4] There is a plethora of authority holding that a point not briefed or argued may be treated as waived.[5] Rule 19 (3) Second of our court provides that, "A specification of the points relied upon shall set out separately and particularly each point asserted and intended to be urged."

We are not unmindful of the inherent power of our court to note error of our own accord if we deem it grave or fundamental. This rule is well recognized and has been adhered to by our court in a number of cases.[6] In view of the mandate of the Supreme Court directing us to examine the issue of net worth in light of what that court said in Holland v. United States, decided December 6, 1954, and kindred cases, we have done so and are of the view that the Government's evidence with respect to net worth fully meets all the tests laid down by the Supreme Court in the Holland case. The Government was not in this case, as in the Holland case, forced to rely upon circumstantial evidence and financial facts to reconstruct the taxpayer's

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[4] 24 C. J. S. 640.

[5] Kreuzer v. United States, 254 F. 34; Schwyhart v. United States, 82 F. (2d) 725; United States v. Mansavage, 178 F. (2d) 812; Utley v. United States, 115 F. (2d) 117; Kahn v. United States, 20 F. (2d) 782; Cornes v. United States, 119 F. (2d) 127.

[6] Crabb v. United States, 99 F. (2d) 325; Edgmon v. United States, 87 F. (2d) 13; Kelly v. United States, 76 F. (2d) 847; Williams v. United States, 66 F. (2d) 868; Lewis v. United States, 92 F. (2d) 952.

financial statement in order to establish increases in net worth during the period in question. Here it relied entirely upon the five financial statements prepared in detail by appellant and filed with a bank for a line of credit. These financial statements were prepared as of August 17, 1943, March 15, 1944, April 28, 1945, April 20, 1946, and January 1, 1947. These financial statements showed appellant's net worth as follows: On August 17, 1943, $49,895; on March 15, 1944, $64,252.52; on April 28, 1945, $87,202.50; on April 20, 1946, $96,090.70; and on January 1, 1947, $123,494.84. By comparing the net worth reflected in the inventory of any year with the statement for the preceding year, we have a beginning as well as an ending inventory. From the sums reflected as net worth in these statements must be deducted those sums which augmented appellant's net worth but do not reflect cash income. The comparison with his 1945 financial statement shows that the accounts receivable reported in his 1946 statement increased by $1,661.29; that the 85 shares of stock received by him from the Moffat County State Agency for which he gave credit to the company in the sum of $8,500 was listed on that statement at $13,500. $5,000 of such listed value must therefore be considered as an increase in value of this stock and not as taxable income. Watts testified that his one-half interest in 220 lots in Craig, Colorado, which he listed at a value of $5,500 in his January, 1947, statement, was actually worth $1,650 when he got it. Assuming that all this increase in value occurred in 1946, there must then be deducted from the net worth the sum of $3,850 as not represented as taxable income. Deducting these items in the total sum of $10,511.29 from the increase in the net worth for the part of the year 1946 represented by the January 1, 1947, financial statement leaves unaccounted an increase in the net worth during this portion of 1946 of $16,729.69. This does not take into account living expenses during 1946 which must have been considerable and also reflect additional income.

This has been corrected by the Court of Appeals to read:

"a comparison of his April 20, 1946, and January 1, financial statements . . . ."

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The unexplained net worth increase, as reflected by the January 1, 1947, financial statement, off $16,792.69 did not stand unsupported and uncorroborated. The Government did adduce additional evidence of likelly sources of unreported taxable income which might account for the increased net worth shown on the 1946 statement. Leslie H. Ward, Enforcement Counsel of the Board of Internal Revenue, testified to a conference he had with Watts and his attorney respecting ten specific items which the Government contended constituted taxable income. According to his testimony, Watts in effect admitted that seven of the items totalling approximately $19,987 should have been returned as income. This sum proximates the unaccounted increase in the net worth of 1946 plus the reported income of $4,556. The Government's version off what occurred in this conference, if believed by the jury, as it no doubt was, would meet the burden resting on the Government under the Holland decision and warrant a submission of the case to the jury under proper instructions.

Neither do we think the court's instruction as to the theory of net worth is erroneous. The instruction is set out verbatim in Footnote 7. What the court in effect told

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[7] "Now, one theory in the government's case is that this man's net worth increased in a substantial sum of money. That is to say, starting out at the beginning of a period with a determination of the value of what he owned and then finding that at the end of the period that the value of what he owned was substantially greater, and that that increase in net worth was due to the acquisition of additional assets and not confined merely to increase in the increment, appreciation in value of the assets he formerly had; the government claims that if he, during that time, made purchases, spent money, and that sum of money which he spent is substantially in excess of what he reported on his income tax return, and that that money is not shown to have been inherited or received by him by way of a gift, it is reasonable to infer that he derived the money from earnings, from income, and if that sum of money is substantially in a sum larger than the amount he has been reporting on his income tax return you, ladies and gentlemen of the jury, are entitled to take that into account.

"You may infer that the money was income that he didn't report, and you may infer, if the amount is large and substantial, that he knew or must have known that he was understating his income."

the jury was that if it found a substantial increase in net assets constituting net worth and such increase was not due to the appreciation in value of assets on hand at the beginning of the accounting period and did not reflect increases in assets purchased with money shown to have been received by way of inheritance or gift, and if such sum spent for such additional assets is substantially in a sum larger than the amount he had been reporting in his income tax returns, the jury was entitled to take that into account and could infer that the money was income which he did not report, and if the amount was large, the jury might infer that he knew that he was understating his income. We think that correctly stated the law as enunciated in the Holland case.

We are still of the opinion that in view of the fact that the Government introduced evidence as to the unreported numerous specific transactions from which the jury might conclude that substantial income resulted and that in view of the fact that appellant apparently concluded that no reversible error occurred because of the net worth evidence presented by the Government, by failing to urge that question on appeal he waived it and may not now be heard to complain. But in any event and considering the net worth theory of the case, no reversible error occurred. To illustrate, no doubt the jury refused to believe Watts' testimony that the 85 shares of stock became totally worthless and that he was therefore not required to report it in his 1946 income tax. This the jury would be warranted in concluding from the fact that on January 1, 1947, in his financial statement he ascribed a value to this stock of $13,500, which he on the stand claimed was totally worthless in 1946.

AFFIRMED.

Judgment of the United States Court of Appeals for the Tenth Circuit

(March 16, 1955)

Seventy-eighth Day, November Term, Wednesday, March 16, 1955.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was submitted to the Court.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Robert Maxwell Watts, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Order Staying Mandate

(March 28, 1955)

By order of March 28, 1955, the mandate of the United States Court of Appeals was stayed for a period of thirty (30) days from that day under provision of paragraph 3 of rule 28.

Clerk's Certificate

(April 11, 1955)

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true and complete copy of the judg-

ment of the Supreme Court of the United States, and the opinion and judgment of the United States Court of Appeals for the Tenth Circuit (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said court, No. 4736, wherein Robert Maxwell Watts was appellant, and United States of America was appellee, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 11th day of April, 1955.

ROBERT B. CARTWRIGHT, *Clerk of the United States Court of Appeals, Tenth Circuit.*

By /s/ GEORGE A. PEASE
Chief Deputy Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 726

ROBERT MAXWELL WATTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS

The first opinion of the Court of Appeals (R. 367-372) is reported at 212 F. 2d 275. The *per curiam* order of this Court is reported at 348 U. S. 905. The second opinion of the Court of Appeals (Pet. App. 2-8) is not yet reported.

JURISDICTION

The original judgment of the Court of Appeals was entered on April 16, 1954. (R. 373.) On Jan-

uary 10, 1955, a writ of certiorari was granted (Pet. App. 1), and a judgment entered vacating the judgment below and remanding the case to the Court of Appeals (Pet. App. 2). On March 16, 1955, the Court of Appeals entered the second judgment affirming petitioner's conviction, of which review is now sought. (Pet. App. 9.) The petition for a writ of certiorari was filed on April 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

STATEMENT

The Court of Appeals, by judgment entered April 16, 1954, affirmed the conviction of petitioner. This Court, on January 10, 1955, granted certiorari in this and a number of other cases presenting "net worth" questions, and remanded to the Court of Appeals "for consideration in the light of *Holland* v. *United States*, *Friedberg* v. *United States*, *Smith* v. *United States*, and *United States* v. *Calderon*, decided by this Court December 6, 1954."

In compliance with the mandate of this Court, the Court of Appeals reconsidered the case and again affirmed the conviction of petitioner.

Inasmuch as the original petition filed in this case on June 14, 1954 (No. 135, this Term), is in most respects identical with the present petition, the Government will rely upon its original brief in opposition, except in those instances where petitioner now asserts that the Court of Appeals did not properly apply the principles set down in *Holland* v. *United States*, 348 U. S. 121. Accordingly, the

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Court is respectfully referred to the Government's original brief in opposition (No. 135, this Term) for the questions presented, statute involved, statement of facts and argument concerning the issues which have already been presented.

ARGUMENT

The present petition repeats the questions presented earlier this Term (in No. 135), except that the questions originally numbered 3(a) and (b), concerning the net worth issues, have been omitted. In their stead, petitioner preserves in a footnote (fn. 1, Pet. 2), in the event certiorari is granted, the contention that the trial court's net worth instruction, sustained by the court below, "conflicts with the principles and the requirements laid down by this Court in *Holland* v. *United States*, 348 U. S. 121." The assertion is not documented and is not substantial.

As the opinion below makes clear (Pet. App. 4-5, 8), the net worth evidence in this case served merely to corroborate the proof of specific items of unreported income. Referring to this corroborative evidence, the trial court made clear to the jury that increases in net worth could be deemed significant only if they represented "taxable income" rather than non-taxable receipts like gifts or inheritances or unrealized gain resulting from appreciation in the value of assets (R. 246-247). These instructions, never even questioned when the case was first appealed to the court below, afforded ample guidance for the jury in the circumstances of this case.

It is clear, moreover, from the petition itself, that the critical issues at the trial related to specific items of unreported income rather than to the evidence of increases in net worth.

Again in a non-specific manner, while agreeing that the opinion of the court below "contains no explicit conflict with the views of this Court", petitioner contends (Pet. 2, fn. 1) that the Court of Appeals "has predicated its conclusion in large measure on a factually erroneous analysis of petitioner's financial statements." We submit, to the contrary, that in reconsidering the case pursuant to this Court's mandate, the court below (see Pet. App. 5-7) actually viewed the evidence in the most favorable light possible for petitioner, giving effect to his self-serving statements which could well have been rejected by the jury.

Finally, in his argument that wilfulness cannot be inferred from a mere understatement of income, petitioner relies (Pet. 17) on part of this Court's discussion of wilfulness in *Holland,* but overlooks proof of acts here similar to those referred to in the remaining part of this Court's statement, 348 U. S. at 139, which were found sufficient to justify the jury's inference of wilfulness. For example, there was extensive evidence in this case of failure to record income in petitioner's books and shifting attempts, all of which the jury could readily have found false, to explain such failures. See Br. in Opp., No. 135, this Term, pp. 5-10, 12-14. This evidence amply sustained a finding of wilfulness.

CONCLUSION

The decision below properly applied the principles set down by this Court in *Holland* and is in full compliance with the mandate of this Court. The petition should be denied.

Respectfully submitted,

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